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No. 82-789

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES D. WILKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I.
QUESTIONS PRESENTED FOR REVIEW

1. Where the prosecution is directed by a pretrial order to produce all exculpatory evidence to the defendants, can the appellate court circumvent the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), by condoning the production of *Brady* material by the government after the trial has proceeded some length in order to preclude the defendants from reurging pretrial severance motions pursuant to Rule 14 of the Federal Rules of Criminal Procedure.

2. Where the District Court has determined that more than one conspiracy exists, and severs some of the defendants, can the appellate court circumvent this Court's holdings in *Kotteakos v. United States*, 328 U.S. 750 (1946) and *Berger v. United States*, 295 U.S. 78 (1935), by determining that only one conspiracy did in fact exist.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, JAMES D. WILKETT, requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on September 9, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was directed to be published, and will shortly appear in the Federal Reporters series. It appears in Appendix A to this petition. No opinions were rendered by the trial court.

JURISDICTION

The petitioner is seeking a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in order to review a judgment entered on September 9, 1982. No Petition for Rehearing was filed. Jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. United States Constitution, Amendment V, provides, in pertinent part that a person shall not:

> "Be deprived of life, liberty or property, without due process of law..."

2. Rule 14 of the Federal Rules of Criminal Procedure which states:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant severance of defendants or provide whatever relief justice requires."

3. Title 21 U.S.C. Section 841(a)(1) which states:

> "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) To manufacture, distribute, or dispense, or possess with intent to manufacture, dispute, or dispense, a controlled substance;"

4. Title 21 U.S.C. Section 846, which states:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fined or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

The petitioner was charged in the United States District Court for the Western District of Oklahoma with the crime of

conspiring to distribute Dilaudid, a Schedule II Controlled Substance in violation of Title 21, U.S.C., Section 846. The style of the case was *United States of America, Plaintiff, v. Harold D. Behrens, James D. Wilkett, Sr., James M. Wilkett, Jr., Fred Weed, Thomas H. Conklin, Jr., D.O., Joe Hoover, R. Ph., and Harvey Lee Mize, Defendants,* Criminal Number 80-147-T. The petitioner herein was found guilty by the jury on the one count indictment charging the violations of Title 21, U.S.C. Sections 841(a)(1) and 846, and petitioner was sentenced to fifteen (15) years imprisonment. This judgment and sentence was affirmed by the Court of Appeals for the Tenth Circuit, *United States of America v. Harold D. Behrens, James D. Wilkett, James M. Wilkett, and Fred Weed,* Numbers 81-1086, 81-1187, 81-1186, and 81-1253 on September 9, 1982. Petitioner is presently serving a fifteen (15) year sentence for his conviction, the trial judge and the Tenth Circuit having denied appeal bond to the petitioner.

B. RELEVANT FACTS CONCERNING THE PETITIONER'S CONVICTION FOR CONSPIRACY

The petitioner in this case was charged with numerous co-defendants for conspiring to distribute Dilaudid, a Schedule II Narcotic Controlled Substance. It was alleged that the petitioner was the recipiant of prescriptions for the Dilaudid written by Dr. Thomas Conklin, and filled by Joe Hoover, a registered pharmacist. The petitioner herein then would sell the drug to James Logan Powell, an unindicted co-conspirator, and Harold Dean Behrens who was indicted with the petitioner. Powell and Behrens would then distribute the drug to various people in Oklahoma City, Oklahoma.

At the time of the trial, the petitioner's co-defendant Behrens was charged with a triple homicide which allegedly arose out of the co-defendant Behrens' drug trafficking operations in Oklahoma City. The petitioner herein, along with the other co-defendants, timely moved for a severance from the co-defendant Behrens due to potential prejudice arising out of the publicity engendered by the triple homicide. The trial court declined to sever the petitioner herein from the co-defendant Behrens prior to trial. The petitioner herein also moved for disclosure of any exculpatory material under *Brady v. Maryland,* 373 U.S. 83 (1963), which the prosecution might have. The trial court

sustained that motion, directing the prosecution to provide the petitioner herein with all exculpatory material. The case proceeded to trial, and at the close of the second day of trial the prosecution provided a voluminous amount of material to the petitioner consisting primarily of grand jury testimony and FBI investigative reports which documented that the source of the Dilaudid being distributed in Oklahoma City was elsewhere than Stigler, Oklahoma, the residence of the petitioner herein and co-defendants Conklin and Hoover.

The prosecution originally had planned to call as witnesses the parties who had testified before the grand jury as to the source of the Dilaudid, but did not, in fact, call those witnesses at trial due to procedural difficulties. The reason that the prosecution did not call the witnesses whose testimony before the grand jury, and statements to the FBI, was that the source of their information as to the source of the Dilaudid was one of the victims in the triple homicide. The trial judge further determined that any such reference would force the trial judge to declare a mistrial on the case. As a consequence, neither the prosecution, nor the petitioner herein presented any evidence to the jury that the source of the Dilaudid was elsewhere than Stigler, Oklahoma.

During the course of the trial, the trial court also determined that the conspiracy involving Dr. Conklin and Joe Hoover, the pharmacist, was separate and distinct from the conspiracy charged, and consequently severed the Defendants Hoover and Conklin from the trial due to the lack of proper venue over them in the Western District of Oklahoma.

The petitioner herein moved for a mistrial on the ground that the failure to timely produce the *Brady* material, combined with the prejudicial joinder with co-defendant Behrens, precluded the petitioner from bringing to the jury's attention exculpatory material showing that the source of the drugs distributed in Oklahoma was from some place other than Stigler, Oklahoma. The petitioner herein also moved to dismiss the indictment after Hoover and Conklin were severed on the ground that the evidence showed, and the trial court found, the existence of more than one conspiracy, thus leading to a classic material variance under *Kotteakos v. United States*, 328 U.S. 750 (1946). The

district court merely considered this motion at the close of the case along with the usual Motion for Judgement of Acquittal, and overruled all of the petitioner's motions.

On appeal the United States Court of Appeals for the Tenth Circuit determined that the petitioner's argument as regarded the material variance was incorrect as there was only one conspiracy, and further ruled that since the prosecution provided the *Brady* material during trial the petitioiner herein suffered no prejudice. The Court of Appeals therefore affirmed the judgment of the trial court. Petitioner herein did not petition the Tenth Circuit for a rehearing.

EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the District Court for the Western District of Oklahoma of one count of conspiring to distribute a Schedule II Controlled Substance under Title 21, Sections 841(a)(1) and 846.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided federal questions in a way in conflict with the applicable decisions of this Court.

I. THE TENTH CIRCUIT'S DECISION UPHOLDING THE TRIAL COURT'S REFUSAL TO GRANT PETITIONER'S REQUEST FOR A MISTRIAL IS IN CONFLICT WITH THIS COURT'S DECISIONS.

The petitioner herein was charged with having conspired to distribute Dilaudid, a Schedule II Narcotic Controlled Substance. The basis for the charge was that the petitioner herein would receive Dilaudid from a pharmacist in Stigler, Oklahoma, with prescriptions written to the petitioner from a doctor in Stigler, Oklahoma. The petitioner herein, the doctor, and the pharmacist were all residents of Stigler, Oklahoma, which lies within the venue of the United States District Court for the Eastern District of Oklahoma. The petitioner herein would then deliver the Dilaudid to James Logan Powell, an unindicted co-conspirator who was the government's primary witness, and Harold Dean Behrens, who was indicted along with the

petitioner. Behrens and Powell would then distribute the drug in Oklahoma City, Oklahoma, wherein lies the venue for the United States District Court for the Western District of Oklahoma. On November 6, 1980, the trial court entered an order sustaining the petitioner's request for the production of exculpatory material under *Brady*. At the close of the second day of trial the prosecution provided the petitioner with grand jury testimony and FBI reports of the prosecution's remaining witnesses which had not yet been called. This material, which the prosecution erroneously treated as *Jenks Act Material*, 28 U.S.C. Section 3500, contained repeated references to the fact that the Dilaudid which Behrens was distributing in Oklahoma City was coming from Texas. In none of the testimony to the grand jury, or the FBI and police reports, was there any mention that the source of the Dilaudid was Stigler, Oklahoma. Unfortunately, the witnesses who had testified before the grand jury, and whom the prosecution intended to call to testify against the petitioner had learned about the Dilaudid distribution from one Raymond Peters. At the time of petitioner's trial, Peters an unindicted co-conspirator, had allegedly been murdered by petitioner's co-defendant Behrens along with two other victims. The triple homicide, for which co-defendant Behrens was later convicted, had garnered a great deal of adverse pre-trial publicity, and had, in fact, been the basis for a pre-trial motion to sever on behalf of the petitioner herein. As the trial court had refused to grant the severance, it ruled that any reference to the triple homicide in petitioner's trial would mandate the trial court's ordering a mistrial.

The problem confronting the trial court, and indeed the petitioner herein, became apparent during the testimony of one Marcia Lynn Widner whose testimony was based upon conversations with Peters. The district court correctly noted that the petitioner herein, and the other defendants, would be unable to cross-examine Widner without reference to the triple murder, and consequently struck her testimony. The prosecution then rested its case declining to call its other witnesses who were the source of exculpatory material provided to the petitioner at the close of the second day of trial. As the petitioner herein could not call those same witnesses without inviting error, thus mandating

a mistrial, the petitioner herein was wholly precluded from bringing the exculpatory evidence before the jury. At that juncture, the petitioner moved for a mistrial.

The basis for the petitioner's mistrial due to the failure to timely provide the exculpatory material was based upon the fact that had the *Brady* material been furnished prior to trial, the petitioner herein could have reurged his Motion for Severance from the co-defendant Behrens. Obviously, had the petitioner herein not been forced to stand trial with co-defendant Behrens the exculpatory evidence could have been brought before the jury.

The Tenth Circuit dismissed the petitioner's *Brady* argument on the ground that *Brady* is not violated when the *Brady* material is made available to the defendants during a trial, citing *United States v. Alberico*, 604 F.2d 1315 (10th Cir. 1979) *cert. denied.* 444 U.S. 992 (1979). Assuming arguendo that such an interpretation of *Brady* is correct, the petitioner herein would assert that it was the combination of the failure to provide the *Brady* material prior to trial with the prejudicial joinder with co-defendant Behrens that deprived him of a fair trial. Petitioner herein could not, without inviting error, place the *Brady* material before the jury. As such, it was fundamentally wrong to allow the prosecution to disregard the trial court's order to produce the *Brady* material prior to trial. Had the *Brady* material been timely produced, there can be no doubt that the petitioner herein would have reurged his Motion to Sever from Defendant Behrens, and that such a motion would have been sustained by the trial judge. The Petitioner herein would submit that by refusing to provide the *Brady* material prior to trial the prosecution was able to circumvent the very spirit and letter of *Brady*. If the Tenth Circuit's interpretation of *Brady* is correct, the prosecution need only deliver *Brady* material during the trial of an accused. In the realm of conspiracy cases more often than not, defendants will be precluded from using the exculpatory material in their defense. Petitioner would submit that such is certainly not within the spirit or the letter of *Brady*. In any event, the failure of the government to timely provide the *Brady* material in the petitioner's case is analogous to the situation where the prosecution never presents *Brady* material without inviting error

and a mistrial is no different from the situation where the *Brady* material is never brought forth.

II. THE TENTH CIRCUIT'S AFFIRMATION OF THE TRIAL COURT'S REFUSAL TO DISMISS THE CASE AGAINST THE PETITIONER DUE TO A PREJUDICIAL VARIANCE IS IN CONFLICT WITH THIS COURT'S DECISIONS.

During the course of petitioner's trial, it became obvious and apparent that the evidence showed the existence of more than one conspiracy. Further, the evidence showed the existence of conspiracies of which the petitioner was not charged. The trial court determined that there was more than one conspiracy at the time that it severed the petitioner's co-defendants Conklin and Hoover. As stated by the district court in its order dismissing Hoover and Conklin:

> "When, as here, a single conspiracy has been charged and the evidence show the existence of two separate conspiracies, there are at least two courses opened to the court. In *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974), the tenth circuit outlined the possibilities: (1) The trial may continue against all defendants with cautionary instructions to the jury regarding the multiple conspiracies, or (2) when the prejudice to some defendants from the spillover evidence where the possibility of guilt by association cannot be cured by cautionary instructions, the court may require the government to elect against which defendants it chooses to proceed and the remainder severed for separate trial."

The district court did, in fact, sever the co-defendants Hoover and Conklin on the basis that the evidence documented the existence of more than one conspiracy. At that juncture, the petitioner herein moved to dismiss the indictment against him on the basis of *Koetteakos v. United States*, 328 U.S. 750 (1946). As herein above noted, the district court declined to dismiss the indictment against the petitioner at the close of the trial. On appeal, the United States Court of Appeals for the Tenth Circuit determined that the trial judge concluded that all of the activity

constituted one conspiracy to sell Dilaudid illegally for resale upon the street. Nonetheless, the Tenth Circuit acknowledged that at least one separate conspiracy was proven at trial, which mandated the district court's severance of Hoover and Conklin from the trial. As this Court has heretofore held, the issue is not whether there has been a variance in the proof, but whether there has been such a variance as to effect the substantial rights of the accused.

At the trial of this case the petitioner herein admitted that he had received prescriptions filled by Hoover and written by Conklin. The petitioner herein testified that he used the Dilaudid both for personal medical reasons, and to dope his racehorses. The trial court and the court of appeals concluded that this conspiracy was "the racehorse conspiracy".

On appeal the petitioner herein argued that the evidence at trial documented the existence of numerous conspiracies, with the petitioner herein lacking involvement in some of the conspiracies. The petitioner herein asserted on appeal that the evidence documented the following conspiracies.

1. The racehorse conspiracy between the petitioner, Hoover and Conklin.
2. A separate conspiracy between the petitioner and James Logan Powell, an unindicted co-conspirator, and Harold Dean Behrens whereby the petitioner allegedly delivered Dilaudid to Powell and Behrens.
3. Numerous conspiracies involving the distribution of Dilaudid in Oklahoma City by Powell, Behrens, and co-defendant Fred Weed.

No evidence was presented at trial linking the petitioner herein to the Oklahoma City distribution of Dilaudid. The court of appeals determined that the trial court determined that there was one conspiracy to sell Dilaudid illegally for resale on the streets, and that the petitioner herein would be held accountable for that conspiracy. Nonetheless, the simple fact of the matter is that the trial court determined and the appeals court noted, that at least two conspiracies were present. Further, that the existence of more than one conspiracy mandated the severance of Hoover and Conklin.

It is crucial to note, however, that the government alleged that the initial source of the Dilaudid was Hoover and Conklin. The government, therefore, based its indictment on a theory of one conspiracy with its roots in Stigler, Oklahoma. The trial court, and the court of appeals, found that Hoover and Conklin's involvement was in the racehorse conspiracy, and that it was a separate conspiracy from the one proven against the petitioner. Even so, the only evidence presented which linked the petitioner to Dilaudid was, by necessity, the racehorse conspiracy with which the petitioner herein admitted being involved. It is important to note, that as hereinabove noted, no evidence was presented linking the petitioner herein to the distribution of Dilaudid in Oklahoma City. In effect, then, the petitioner was convicted for a street sale conspiracy on the basis of evidence presented in support of the racehorse conspiracy.

As set forth in the hereinabove discussion of the failure to timely provide the exculpatory information, exculpatory evidence existed which documented that the source of the Dilaudid being distributed in Oklahoma City was from a source other than Stigler, Oklahoma. The petitioner herein was, however, precluded from bringing this evidence before the jury.

The simple fact of the matter is that one conspiracy was alleged against the petitioner, and at least two were proven to have existed by the evidence presented against the petitioner at trial. Further, the evidence of the racehorse conspiracy, which was the only evidence linking the petitioner herein with Dilaudid, was crucial evidence required by the prosecution to gain a conviction against the petitioner. Thus, the petitioner was found guilty of a street sale conspiracy on the evidence of an admittedly separate and distinct conspiracy, which was so separate and distinct as to mandate the district court severance of Hoover and Conklin. Compounding the prejudicial effect to the petitioner herein was his inability to present the exculpatory evidence to the jury showing no involvement in the Oklahoma City street sale conspiracy, as the source of the Dilaudid distributed in Oklahoma City was from some place other than Stigler.

As such, the petitioner herein would assert that it was clearly erroneous for the court of appeals to affirm the district court conviction in apparent total disregard of this court's holding in *Kotteakos v. United States*, 328 U.S. 750 (1946).

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit is obviously a strained attempt to distinguish or circumvent this Court's holdings in both *Brady v. Maryland* and *Kotteakos v. United States*. As petitioner has hereinabove asserted, the failure to timely provide exculpatory information, and the existence of a prejudicial variance are inextricably interwoven. The court of appeals attempt to circumvent both *Brady* and *Kotteakos*, cannot and must not be allowed by this Honorable Court.

For the reasons hereinabove stated, the petitioner requests a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Nos. 81-1086, 81-1187, 81-1186 and 81-1253
	)	
HAROLD DEAN BEHRENS, JAMES D. WILKETT, JAMES M. WILKETT, AND FRED WEED	)	
	)	
Defendants-Appellants.	)	

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. CR-80-147T)

W. David Pardue, Oklahoma City, Oklahoma for Defendant-Appellant Harold Dean Behrens; Gene Stipe of Stipe, Gossett, Stipe, Harper & Estes, Oklahoma City, Oklahoma, for Defendants-Appellants James D. Wilkett and James M. Wilkett and Jack L. Freeman, Edmond, Oklahoma, for Defendant-Appellant Fred Weed.

James F. Robinson, Assistant U.S. Attorney (David L. Russell, United States Attorney, with him on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before HOLLOWAY, LOGAN, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

These consolidated appeals follow defendants' conviction for conspiracy to unlawfully distribute narcotics in violation of 21 U.S.C. §§ 841(a) (1) and 846. Defendants seek reversal of the verdict against them primarily on grounds of prejudicial suppression of evidence by the prosecution, improper evidentiary determinations by the trial judge, and insufficiency of the evidence. We affirm.

I.

In October 1980, a federal grand jury indicted seven persons for conspiracy to illegally distribute the narcotic Dilaudid. The named defendants included Harold Behrens, Dr. Thomas Conklin, Joe Hoover, Harvey Mize, Fred Weed, James D. Wilkett, and James M. Wilkett. The case against Mize was subsequently dropped by the Government, and the trial court later severed the actions against Conklin and Hoover. The remaining defendants were found guilty following a jury trial.

The facts relevant to this appeal are derived from the testimony of unindicted co-conspirators and Government investigators, together with all reasonable inferences to be drawn therefrom, properly reviewed in the light most favorable to the prosecution. *See United States v. Blitstein*, 626 F.2d 774, 776 (10th Cir. 1980). The Wilkett defendants obtained large quantities of Dilaudid through prescriptions written by Dr. Conklin and filled by pharmacist Hoover. The Wilketts then distributed the Dilaudid to defendant Behrens and James Powell, an unindicted co-conspirator who was the Government's primary witness. Behrens and Powell resold the drugs for profit. Bobby Weed, another unindicted co-conspirator, frequently purchased Dilaudid from Behrens for illicit resale. Defendant Fred Weed loaned Bobby money for such purchases, directed Bobby to street customers for the drug, and took a percentage of Bobby's profit.

Defendants raise myraid arguments in support of their appeals. Defendant Fred Weed asserts that the indictment is fatally defective. All defendants contend that the Government failed to timely disclose exculpatory material. Defendants James

D. Wilkett, James M. Wilkett, and Weed claim the trial judge erred by not adhering to the preferred order of proof vis-a-vis co-conspirator hearsay, by not severing their cases from that of defendant Behrens, and by not declaring a mistrial after severing two defendants from the case. Defendants each separately assert various insufficiency of the evidence arguments as grounds for reversal of their convictions. Behrens and the Wilkett defendants also urge that evidence relating to prescriptions for Dilaudid, and the summaries of such evidence prepared by the Government, were erroneously admitted into evidence.

II

A. The Indictment

The indictment charges that defendants and the unindicted co-conspirators

> "*willfully and knowingly* did conspire, confederate and agree together, with each other and with other persons unknown to the Grand Jury, to violate Title 21, United States Code, Section 841(a) (1), in that they combined, conspired, confederated and agreed to distribute a Schedule II narcotic controlled sustance, to wit: Dilaudid, in violation of Title 21, United States Code, Section 846."

Rec., vol. I, at 1 (emphasis added). The sustantive offense set out in 21 U.S.C. § 841(a) (1), however, prohibits any person from "knowingly or intentionally" distributing a controlled substance. Relying on *Robinson v. United States*, 263 F.2d 911 (10th Cir. 1959), defendant Weed argues that the indictment is fatally defective because it does not contain the "knowingly or intentionally" language. We have recently rejected an identical argument. *See United States v. Perry*, No. 81-1011, slip op. at 2-3 (10th Cir. July 6, 1982).

B. Exculpatory Evidence

Although all defendants made a general request for Brady material, the Government failed to produce prior to trial certain grand jury testimony and police statements containing exculpatory information indicating that Behrens obtained some

Dilaudid from Texas. The Government erroneously treated this Brady material as Jencks material, required to be produced at trial rather than pretrial, *See* 28 U.S.C. § 3500(b). All of the material was produced during the course of the trial. Defendants concede the production but claim they were prejudiced by its untimeliness.

The prosecutorial duty to provide defense counsel with exculpatory evidence stems from the Supreme Court decision in *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* prohibits supression of material evidence favorable to an accused when disclosure is requested by the defense. *Id.* at 87. However, the rule applies in situations involving "defendant's discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added). This circuit has previously concluded that *Brady* is not violated when the Brady material is available to defendants during trial. *See United States v. Alberico*, 604 F.2d 1315, 1319 (10th Cir.), *cert. denied* 444 U.S. 992 (1979).

We do not condone the Government's conduct in failing to liberally construe *Brady* in accordance with the trial judge's continuing order to do so. Nevertheless, defendants have not demonstrated that the delayed disclosure of evidence deprived them of a fair trial. *See United States v. Jackson*, 579 F.2d 553, 560 (10th Cir.), *cert. denied*, 439 U.S. 981 (1978). Defendants correctly note that their attorneys' trial strategy and cross-examinations might have been enhanced had the exculpatory material been provided earlier. The relevant standard of materiality, however, does not focus on trial preparation but instead on whether presentation of the evidence would have created a reasonable doubt of guilt that did not otherwise exist. *Agurs*, 427 U.S. at 112 n.20; *Albertico*, 604 F.2d at 1319. No such showing has been made by defendants in this case. Even though Behrens may have obtained some Dilaudid from Texas, there was abundant evidence that Stigler, Oklahoma was the source of a great deal of the Dilaudid that was distributed.

C. Preferred Order of Proof

Statements made by one member of a conspiracy are admissible evidence against co-conspirators under certain

circumstances. *See* Fed. R. Evid. 801(d)(2)(E). Such material is properly admitted evidence so long as the trial judge specifically determines that the Government has independently established

> "it is more likely than not that (1) the conspiracy existed; (2) the declarant and the defendant against whom the conspirator's statement is offered were members of the conspiracy; and (3) the statement was made during the course and in furtherance of the objects of the conspiracy."

United States v. Peterson, 611 F.2d 1313, 1330 (10th Cir.). *See also United States v. Redeker*, 664 F.2d 242 (10th Cir. 1981); *United States v. Stipe*, 653 F.2d 446, 449 (10th Cir. 1981); *United States v. Andrews*, 585 F.2d 961, 966 (10th Cir. 1978). It is preferable for the Government to independently establish the conspiracy and the defendants' connection with it before introducing incriminating declarations of conspirators. *Peterson*, 611 F.2d at 1330; *Stipe*, 653 F.2d at 449. This preferred order of proof should be adhered to absent "some substantial reason." *United States v. Calabrese*, 645 F.2d 1379, 1387 (10th Cir.), *cert. denied*, 451 U.S. 1018 (1981).

Defendants Fred Weed and the Wilketts contend that the trial judge unjustifiably departed from this preferred order of proof without making the requisite independent evidence determination. A careful review of the trial proceedings undermines this assertion.

The record reveals that the trial judge scrupulously adhered to the preferred order of proof, requiring the Government to present nonhearsay evidence of a conspiracy and the involvement of each defendant. Co-conspirator hearsay was introduced only after the judge announced that the requirement's safeguards had been substantially realized and that the trial had reached a point where continued application of the rule was not feasible. The court specifically found that departure from the preferred order "would facilitate the trial, without unfairness to the defendants, and with less confusion to the jury...." Rec., vol. IX, at 518-19.

Prior to this departure from the preferred order of proof, independent evidence established that: (1) the Wilkett defendants sold Dilaudid on a number of occasions to Behrens

and to James Powell for resale; (2) Powell and Behrens split the Dilaudid between them and sold it in the Oklahoma City area at a profit; (3) Bobby Weed purchased Dilaudid from Behrens in the presence of and using money provided by defendant Fred Weed; and (4) Bobby Weed also shared proceeds from Dilaudid "street sales" with Fred Weed. Based upon this independent evidence, the trial judge subsequently made the findings mandated by *Andrews, Petersen,* and their progeny. The treatment of co-conspirator hearsay in this case was entirely proper.

D. Severance

Criminal defendants engaging in the "same series of acts or transactions constituting an offense" can be charged in a single indictment and tried jointly. Fed. R. Crim. Proc. 14; *see also United States v. Bridwell,* 583 F.2d 1135, 1142 (10th Cir. 1978). The trial judge must balance the prejudice to a particular defendant against the interests of judicial economy when evaluating a severance motion. *See Petersen,* 611 F.2d at 1331. The judge's decision on severance matters will not be disturbed on appeal absent an abuse of discretion. *Id.; see also United States v. Hopkinson,* 631 F.2d 665, 668 (10th Cir. 1980), *cert. denied,* 450 U.S. 969 (1981). Such abuse exists when denial of severance deprives an individual of his right to a fair trial. *See United States v. Butler,* 494 F.2d 1246, 1256 (10th Cir. 1974).

Defendants Weed and the Wilketts assert that their joinder with defendant Behrens deprived them of a fair trial. Behrens was charged in a triple murder at the time this conspiracy case commenced. Defendants claim that under these circumstances mere trial association with Behrens constituted prejudice sufficient to mandate severance, and that joinder hampered their ability to introduce allegedly exculpatory material.

The trial judge treated this sensitive issue with caution. Exhaustive voir dire purged the jury box of all knowledge of Behren's involvement in the homicides. The trial judge then preserved this integrity by prohibiting all references to the triple slayings during trial. We conclude that the trial court's decision to deny the motion for severance was not an abuse of discretion.

E. Insufficient Evidence

Defendants make various arguments as to insufficiency of the evidence. We have carefully reviewed the record and are not persuaded by defendants' contentions.

1. The Wilketts

The Wilketts argue there is insufficient evidence that only two conspiracies existed. They say the evidence shows the following three conspiracies in addition to the conspiracy of James D. Wilkett, Conklin, and Hoover to use Dilaudid on racehorsees, which conspiracy the trial judge recognized as separate and severed from the trial:

> (1) one conspiracy between James M. Wilkett and Powell from June into September 1979, which ended when James M. Wilkett stopped selling Dilaudid to Powell;
>
> (2) a separate conspiracy between James D. Wilkett, Powell, and Behrens that began when James D. Wilkett started selling Dilaudid;
>
> (3) a separate conspiracy between Powell, Behrens, Fred [illegible]ed, Bob Weed, and the other unindicted co-conspirators to sell Dilaudid in the Oklahoma City area.

The judge, however, concluded that all this activity constituted one conspiracy to sell Dilaudid illegally for resale on the street.

We have recognized on a number of occasions that "the conviction of a co-conspirator may be sustained upon a sufficient showing of the essential nature of the plan and the individual's connection with it. It is not necessary that each member of the conspiracy know all of the details or be acquainted with all of the parties to the illegal scheme, as long as he is aware of its general scope." *United States v. Johnson*, 645 F.2d 865, 868 n.2 (10th Cir.), *cert. denied*, 102 S.Ct. 329 (1981). *See, e.g., United States v. Parnell*, 581 F.2d 1374, 1382 (10th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979); *see also Blumenthal v. United States*, 332 U.S. 539, 557 (1947). The existence of a number of separate transactions does not require the finding of separate conspiracies. *See United States v. Brewer*, 630 F.2d 795, 799 (10th Cir. 1980); *Parnell*, 581 F.2d at 1382. "Where large quantities of narcotics are being distributed, each major buyer may be presumed to know that he is part of a wide-ranging venture, the success of which depends on performance by others whose identity he may not even know." *Brewer*, 630 F.2d at 800

(quoting *United States v. Watson*, 594 F.2d 1330, 1340 (10th Cir. 1979), *cert. denied*, 444 U.S. 840 (1980)). The same is true of major suppliers.

Reading the record in the light most favorable to the Government and drawing inferences in its favor as we must, we believe the evidence supports the existence of a single conspiracy. Dr. Conklin prescribed a total of 14,000 Dilaudid in quantities of 100 to "James Wilkett," and to James D. Wilketts' brother, father, and two of his employees from March 1979 to June 1980. The prescriptions were filled by pharmacist Hoover. James D. Wilkett admitted to Drug Enforcement Agent Beck that he had received all of the Dilaudid from all of the prescriptions. James M. Wilkett sold 100 tablets of Dilaudid to James Powell in June 1979 and again on six or eight occasions over the next two months. Behrens participated in the purchase from James M. Wilkett in August 1979. Although there is no evidence that James M. Wilkett knew the Weeds and others in Oklahoma City were purchasing the Dilaudid from Powell and Behrens, it is a reasonable inference from the quantities sold that James M. knew the drug was purchased for resale. *See Watson*, 594 F.2d at 1340.

James M. Wilkett quit selling Dilaudid to Powell during September 1979. However, "[t]hat ' [s]ome of the participants remained with the enterprise from its inception until it was brought to an end, and others joined or left the scheme as it went along,' is of no consequence if each knew he was part of a larger ongoing conspiracy." *Brewer*, 630 F.2d at 800 (quoting *Parnell*, 581 F.2d at 1382). When he quit selling the Dilaudid, James M. gave Powell the telephone number of his father, James D. Wilkett. Thereafter, Powell and Behrens purchased Dilaudid from James D. It is a reasonable inference from the record that James M. obtained the Dilaudid he sold from his father, that he knew the Dilaudid was subsequently resold by Powell and Behrens for street use, and that he gave out his father's phone number knowing and intending that the illegal drug distribution conspiracy would continue, which it did. While the evidence linking James M. to the Oklahoma City distribution of Dilaudid is not ample, it is sufficient under our prior case law.[1] Without detailing it here, the evidence and reasonable inferences as to James D. Wilkett's participation in one single conspiracy to

unlawfully sell Dilaudid for resale is not only ample, it is abundant. We conclude there was sufficient evidence of a single conspiracy.

2. Behrens

Defendant Behrens, forced to concede that three witnesses firmly linked him to the conspiracy, asserts the testimony against him is inadequate on grounds of inherent incredibility. Behrens contends that the witnesses implicating him are legally unreliable because of their drug abuse, citing *United States v. Butler*, 481 F.2d 531 (D.C. Cir. 1973), and *Jackson v. United States*, 353 F.2d 862 (D.C. Cir. 1965). However, defendant's case authorities on this point present very different facts from the case at bar. The jury here was properly instructed to consider the testimony of these witnesses with care. It is not this Court's function to weigh the credibility of witnesses on appeal, and we decline to do so here. *See United States v. Gibbons*, 607 F.2d 1320, 1329 (10th Cir. 1979); *Watson*, 594 F.2d at 1339.

3. Weed

Defendant Weed mistakenly suggests that his conviction is infirm because it is based solely on the uncorroborated testimony of an accomplice. Convictions may be founded on such testimony so long as trial judge instructs the jury that the accomplice testimony is to be carefully scrutinized. *United States v. Hill*, 627 F.2d 1052 (10th Cir. 1980). The judge so instructed the jury in this case.

F. Summary Evidence

Defendants Behrans and both Wilketts contend that the introduction of a summary evidence chart was without proper foundation and prejudicial. The chart outlined the Dilaudid prescriptions written by Dr. Conklin and filled by pharmacist Hoover.

Evidentiary summaries are permissible where a case involves "voluminous writings...which cannot be conveniently examined

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[1]James M. Wilkett also contends there is no evidence linking him to the Western District of Oklahoma for venue purposes. Given our conclusions on the existence of one conspiracy, his argument is without merit. There is abundant evidence of overt acts in the Western District by Powell, Behrens, the Weeds, and other unindicted co-conspirators. *See United States v. Petersen*, 611 F.2d at 1333.

in court..." Fed. R. Evid. 1006. A proper foundation for such a summary can be laid throught the testimony of the witness who supervised preparation of the exhibit. *See United States v. Scales*, 594 F.2d 558, 563 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979).

The authenticity of the prescriptions summarized by the chart was adequately established. *See generally United States v. Bruner*, 657 F.2d 1278, 1284 (D.C. Cir. 1981). Drug Enforcement Administration Agent Beck, who prepared the chart, testified that: (1) he personally served Hoover with an administrative search warrant seeking the Dilaudid prescriptions; (2) Hoover identified his files containing prescriptions for Schedule II narcotics; (3) Beck reviewed the prescriptions and took out those pertaining to Dilaudid; (4) the Dilaudid prescriptions were made out to James Wilkett, Wilkett family members, and employees of James D. Wilkett; and (6) James D. Wilkett subsequently admitted he had received all the Dilaudids from all the prescriptions. Beck's testimony critical to authentication was neither inadmissable nor undermined by the subsequent severance of actions against Conklin and Hoover.

We also reject defendants' claim that the chart size was prejudicial. The purpose of the chart was to aid the jury in organizing the evidence, and the summary accurately reflected the underlying prescriptions. *See generally United States v. Seelig*, 622 F.2d 207, 214 (6th Cir.), *cert. denied*, 449 U.S. 869 (1980). "Size alone does not render inadmissible an exhibit containing otherwise unobjectionable objective evidence." *Scales*, 594 F.2d 1197, 1199-2000 (10th Cir. 1977). There being no clear abuse of discretion, we affirm the evidentiary ruling at issue.

G. Mistrial Request

Defendants Weed and the Wilketts assert that a mistrial was required once Dr. Thomas Conklin and pharmacist Joe Hoover were severed from the case. Defendants maintain they sustained substantial prejudice throught the spillover effect of Agent Steve Beck's hearsay testimony relating to Conklin and Hoover.

Beck's testimony can be divided into two categories. His statements directed to the *actions* of Conklin and Hoover in his presence were clearly admissable and unaffected by the subsequent severance. *See Andrews*, 585 F.2d at 965. Beck's

testimony as to the *remarks* of Conklin and Hoover, however, constituted hearsay rendered inadmissible by the severance.

"Whether a motion for mistrial should be granted is within the discretion of the trial judge because he is in the best position to evaluate the effect of the offending evidence on the jury." *United States v. Laymon*, 621 F.2d 1051, 1053 (10th Cir. 1980). We have reviewed the entire record and conclude that the trial court did not abuse its discretion in denying the mistrial motion. Significantly, neither Fred Weed nor James M. Wilkett were mentioned in the Conklin-Hoover statements testified to by Beck. James D. Wilkett was identified by agent Beck as the recipient of the Conklin-Hoover Dilaudid largesse. This problem was vitiated substantially, however, by James D. Wilkett's ultimate admission that he received the drugs, althought he denied selling them to Powell and Behrens.

As we have shown above, there is ample evidence independent of the Conklin-Hoover hearsay to establish beyond a reasonable doubt the source of the Dilaudid and its illegal sale. Under these circumstances, and in view of the trial court's instruction to the jury to disregard the inadmissible hearsay, the motion for mistrial was properly denied

III

We have carefully examined defendants' remaining arguments for reversal and find them unpersuasive.

JUDGEMENT AFFIRMED.

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES D. WILKETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AFFIDAVIT OF MAILING

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

John B. Estes, a member of the Bar of this Court, being first sworn to tell the truth, the whole truth and nothing but the truth, states as follows:

I deposited an envelope containing the original copies of a Petition for a Writ of Certiorari and Entry of Appearance, with first class postage prepaid, addressed to:

Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543

in a mailbox at the United States Post Office in Oklahoma City, Oklahoma at _____ _____ on the _____ day of November, 1982.

_____

John B. Estes

Subscribed and sworn to before me on this _____ day of _____, 1982.

_____

Notary Public

My Commission Expires:

_____

CERTIFICATE OF MAILING

I hereby certify that I deposited an envelope containing the copies of a Petition for a Writ of Certiorari and Entry of Appearance, with first class postage prepaid, addressed to:

Solicitor General
Supreme Court of the United States
Washington, D.C. 20543

James Robinson
Assistant United States Attorney
United States Courthouse
Oklahoma City, Oklahoma 73102

John B. Estes